IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 134 of 2006.

Reserved on: 8.5.2007.

Date of decision: 1.6.2007.

Pint Raj alias Pintu ... Appellant

Versus

State of H.P. … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellant: Mr. M.S. Guleria, Advocate.

For the respondent: Mr. V. Verma, Additional Advocate General.

V.K. Ahuja, J.:

This appeal has been filed by the appellant against the judgment of the Court of learned Presiding Officer, FastTrack Court, Mandi, dated 30.3.2006, vide which the appellant was held guilty under Section 376 I.P.C. and was sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.10,000/-. In default of payment of fine, the appellant was to further undergo rigorous imprisonment for a period of one year.

Briefly stated the facts of the case are that on 6.7.2002 at about 4.30PM, a report was lodged with the police by one 'X' (name not mentioned) alongwith her uncle Kundan Lal that she had studied upto 4th class and had left the school three years ago after the death of her

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

mother 5/6 years ago. She alleged that she was doing the agricultural work and her father was a simpleton who was working on the road. It was alleged by her that today she had gone to the forest for grazing of her cattle and at about 1.30PM, appellant alongwith son of one Bihari Lal came there (hereinafter referred to as accused) and both of them threw her on the ground. She raised an alarm and tried to free herself from both the accused persons and appellant shut her mouth, while the other accused forcibly removed her salwar and kept her on the ground. Thereafter, appellant removed his pent and forcibly committed rape upon her and thereafter, the other accused committed rape. She raised an alarm and her uncle Kundan Lal came to the spot and both the accused persons ran away from the spot after taking their pents in their hands and chappal of one of the accused was left at the spot which was taken by her uncle. On this report, a case was registered and the investigation was conducted. The medical examination of the prosecutrix was conducted by PW-1 Dr. Meena Sharma. The salwar and the shirt worn by the prosecutrix was taken in possession by the police during investigation. The chappal left at the spot and produced by the uncle of the prosecutrix was also taken in possession by the police. On search of the house of the appellant, one chappal was recovered from his house which was taken in possession. The copy of the birth entry of the prosecutrix was taken in possession. The x-ray examination of the prosecutrix was also conducted to determine her age. The investigation of the case was conducted by PW-12 ASI Paras Ram who effected the recoveries and got the medical examination of the prosecutrix as well as accused got conducted from Medical Officer. The vaginal smear as well as underwear of the appellant and underwear of the co-accused as well as shirt and the salwar taken in possession of

the prosecutrix were sent to the Chemical Examiner and on receipt of the report of the Chemical Examiner and on completion of the investigation, challan was filed before the learned Judicial Magistrate who committed the case to the learned Sessions Judge and it was assigned to the learned trial Court, Fast Track Court who tried the appellant as detailed above leading to his acquittal and sentence as mentioned above.

I have heard Mr. M.S. Guleria, Advocate, for the appellant and Mr. V. Verma, learned Additional Advocate General for the respondent and have also gone through the record.

The submissions made by the learned counsel for the appellant were that the learned trial Court had wrongly observed that the rapat Ext.PW8/A lodged by the prosecutrix corroborates her testimony since the rapat or FIR is not a substantive evidence. It was also submitted that there is no positive statement of the Medical Officer that the possibility of commission of rape was not ruled out and, therefore, the medical evidence does not corroborate the testimony of the prosecutrix. It was further submitted that since the prosecutrix was exposed to coitus it cannot be said that she was raped on that day. It was also submitted that the prosecutrix was above the age of 16 years and was a consenting party to the sexual intercourse, if any, and therefore, it cannot be held that she was raped by the appellant. It was also submitted that the seizure of salwar was not a circumstance as against the appellant in case nothing was found on it to connect it with the commission of crime. It was submitted that the chappal of Pawan Kumar co-accused was allegedly taken in possession though the recovery of second chappal was effected from the house of the appellant and this cannot be used as an evidence against the appellant.

It was also submitted that the presence of PW-3 Kundan Lal, uncle of the prosecutrix at the spot does not stand established since a man cannot reach a distance of about 1K.M. on hearing the cries. It was also submitted that the informant has not proved the FIR in question and as such, it cannot be read in evidence. Thus, it was submitted that the prosecution has failed to prove their case beyond any reasonable doubt and in view of the infirmities and contradictions in the prosecution case, the case of the prosecution cannot be relied upon and the findings of the learned trial Court holding the appellant guilty are liable to be reversed.

On the other hand, the learned Additional Advocate General for the respondent had supported the impugned judgment for the reasons given therein supplementing it by the submission that the statement of the prosecutrix was reliable and she had identified both the accused and her statement has been duly corroborated by her uncle who reached the spot at the time rape was being committed by the other accused. It was further submitted that the report was lodged with promptitude, medical evidence as well as the chemical examiner report supports the prosecution version and there are no material contradictions or infirmities in the prosecution story. It was also submitted that the plea of consent was not at all made out from the statement of the prosecutrix or other evidence and cannot be accepted. It was also submitted that the defect in investigation, if any, cannot go at the root of the case and in hilly areas, cries can be heard even from a distance of 2-3 KM and there was nothing improbable to hold that as to how the prosecutrix's uncle reached the spot on hearing the cries. Thus, it was submitted that since findings of

the learned trial Court are based upon correct appreciation of evidence and law they are liable to be affirmed.

Coming to the evidence, there is statement of prosecutrix as PW-2 X, in which she has stated that she was present in the jungle and both the accused came there and committed sexual intercourse with her. She raised cries and her uncle Kundan Lal came there and both the accused fled away from the spot. She came to Police Post Drang and lodged report Mark A. She further stated that her shirt and salwar were seized by the police from her uncle Kundan Lal and had identified the shirt as Ext.P-1 and salwar as Ext.P-2. She further stated that she was got medically examined by the Police.

PW-3 Kundan Lal, uncle of the prosecutrix, has stated that he heard the cries of the prosecutrix, went to the spot and saw that accused Pintu was standing there, whereas accused Pawan Kumar was lying upon the prosecutrix and was committing sexual intercourse with the prosecutrix. On seeing him, both of them ran way. A submission was made by the learned counsel for the appellant that since this witness had seen co-accused committing rape upon the prosecutrix and had not seen the appellant committing the rape, therefore, the statement of the prosecutrix has not been duly corroborated by this witness insofar as the rape allegedly committed by the appellant is concerned. I am not inclined to accept this submission which has no merit in it since a perusal of FIR Ext.PW9/A and rapat Ext.PW8/A shows that firstly the rape was committed by appellant and thereafter by the co-accused. She should have been confronted with these two reports in case there was any improvements or contradictions which was not done. But I have referred to these which clearly shows that similar assertions were made in the FIR that

firstly she was raped by appellant and then by the other co co-accused. The uncle of the prosecutrix had reached there and he found co-accused committing the rape and in case he had reached the spot and the prosecutrix had already been raped by the appellant, how could he depose that the appellant also raped the prosecutrix in his presence. In case he had reached the spot at the time the appellant was committing the rape, the other accused would have run away from the spot and the uncle of the prosecutrix would have saved his niece from being raped. This was a truthful version and the rape could have been committed only one by one and therefore, he had stated that at that time, the co-accused was raping his niece, but he has clearly established the presence of the appellant at that time standing nearby and had also stated that the appellant and co-accused had run away from the spot at that time when they saw him. Thus, the statement of PW-3 Kundan Lal duly corroborates the statement of the prosecutrix. His statement was not shattered in the cross-examination to show that how he could have heard the cries or that he was not present at the spot or that he had not seen the appellant at the spot when he reached there. No suggestions were put to him specifically that he could not have heard the cries or that he is deposing falsely for any reasons whatsoever. Therefore, his statement which does not suffer from any infirmity or contradiction, duly supports the statement of the prosecutrix.

Coming to the medical evidence PW-1 Dr. Meena Sharma who examined the prosecutrix on the same day itself, had found that there was a contusion on the right breast of the prosecutrix pink in colour. She did not observe any local injury on the genitalia and stated that hymen was torn and it admits two fingers easily. Slides were

preserved by her and were handed over to the police. She also stated that the injury seen on the breast can be caused within duration of less than 24 hours. She also deposed that x-ray for age verification was got done and radiological age was found to be 16½ to 17 years. In further cross-examination conducted on an application under Section 311 Cr.P.C. before this Court which was allowed, she was confronted with her statement made before the Juvenile Court. She admitted that the inflamation was not there because the hymen had already been healed. She also stated that the tearing of hymen was very old and it does not correspond to the date of alleged assault. She has not made any specific statement stating that possibility of rape having been committed is not ruled out or did not state in the negative also. The mere fact that the hymen admits two fingers easily and may not have been torn due to this act is not sufficient to hold that no rape was committed upon the prosecutrix. The tearing of hymen may be prior to the date of occurrence and in case vagina admits two fingers it can lead to the inference that the prosecutrix was used to sexual intercourse and the hymen may have been ruptured earlier also but once she has been raped by two persons, possibility cannot be ruled out that the vagina admits two fingers since she was raped by two persons at the time of occurrence, but this medical evidence does not go against the prosecution in any manner. Apart from the above, the report of the Chemical Examiner Ext.PW12/B shows that no blood or semen was found on the vaginal smear. However, semen was found on the underwear and shirt of the appellant and both were found on the salwar of the prosecutrix. The presence of these things on clothes is another circumstance as against the accused which gives credence to the statement of the prosecutrix.

Coming to the plea that the prosecutrix was of the age of above 16 years and was a consenting party, the prosecution had examined PW-4 Subhash Chand, Secretary of Gram Panchayat who had brought record of birth of prosecutrix. According to the certificate Ext.PW4/B, the date of birth of the prosecutrix was proved to be 20.9.1985. This shows that the prosecution was of the age of 16 years plus 9 months or about 15 days or so i.e. she was above the age of 16 years but less than 17 years. The statement of Radiologist PW-10 Dr. J.P. Kaushik who conducted the x-ray examination of the prosecutrix shows that the age of the girl was found to be in between 16½ - 17 years, which stands established from the copy of the birth entry which can be relied upon in preference to this report of the Radiologist. Thus, once the girl was above the age of 16 years, it is true that she can give her consent to the sexual intercourse but no licence is given to any person to commit rape upon a girl of the age of above 16 years presuming that she was a consenting party to the rape. It has to be established from evidence as to whether the prosecution was the consenting party and as such, the accused is not liable, but it cannot be inferred from the statement of the prosecutrix that she was a consenting party to the sexual assault made upon her by the appellant. In cross-examination of PW-2 X, no such suggestions were put up in the alternative also in any manner and the only suggestion made was that they used to play in the forest at the time of grazing cattle daily which was even denied by the prosecutrix in her statement. Nothing can be made out from the cross-examination of PW-2 that she was a consenting party to the sexual intercourse. It is also surprising that she will agree to the sexual intercourse in an open not by the appellant only, but by the other accused also during day time and

since no question of consent arises from the evidence, the possibility of consent is absolutely ruled out and as such, it is clear that the sexual assault was made upon her against her wishes which fact stands established from her statement as PW-2.

To substantiate his pleas, the learned counsel for the appellant had relied upon the following decisions.

The decision in **Yerumalla Latchaiah** Vs. **State of A.P.**, **(2006) 9 Supreme Court Cases 713**, shows that in that case the prosecutrix was aged 8 years at the time of alleged occurrence. According to the evidence of Doctor who examined the prosecutrix immediately after the occurrence, there was no sign of rape. Thus, it was held that the evidence of prosecutrix was belied by medical evidence. In that case, no sperm was detected on the vaginal smears collected and the Doctor has specifically stated that there was no sign of rape at all. The observations were made by their Lordships in view of the facts of that case and the facts of the present case are different as discussed above. Here the statement has been made by the prosecutrix on oath who was mature enough to know the meaning of rape and she stated so very clearly in her statement.

The decision in **State of Maharashtra** Vs. **Ahmed Gulam Nabi Shaikh and others**, **1997 CRI.L.J. 2377,** shows that FIR was not carrying signature or thumb impression of informant. No explanation given for it by officer recording it. It was held that the FIR was liable to be rejected. This decision is not attracted to the present facts, as shall be discussed below.

The decision in **State of Andhra Pradesh** Vs. **Lankapalli Venkateswarlu**, **AIR 2000 Supreme Court 3555**, shows that in that case the prosecutrix gave go-bye to the version in

material particulars as recorded in FIR in her evidence recorded in Court. Medical evidence not supporting allegations made by the prosecutrix and thus, it was held that the acquittal was not liable to be interfered with. In the present case, the prosecutrix had not given a go-bye to the version given in the FIR. It was rather more detailed than the statement made in Court. She was never confronted with any improvements or omissions etc. made by her in the Court as compared to the FIR. Therefore, no benefit can be taken of the facts, which may not have been even stated by the prosecutrix in Court particularly that she was raped firstly by the appellant and then by the other accused. Since she was never confronted with the FIR which is not a substantive evidence and, therefore, no benefit can be taken of any omission etc. made in her statement since she was not confronted with the FIR.

The learned Advocate General had relied upon the following decisions to support his pleas:

The decision in **State of H.P.** Vs. **Lekh Raj and another**, **(2000) 1 Supreme Court Cases 247**, shows that absence of dead or mobile spermatozoa in the vagina or in the cervix of the prosecutrix, held, not a conclusive proof of her not being subjected to forcible sexual intercourse. In regard to the testimony of the victim and its evidentiary value and as and when corroboration is necessary. It was explained by their Lordships that in absence of any ulterior motive for falsely implicating the accused, the testimony of the victim of rape corroborated by medical evidence was held liable.

The decision in **State of H.P.** Vs. **Asha Ram**, **(2005) 13 Supreme Court Cases 766**, shows that in regard to the testimony of the prosecutrix as the sole basis of conviction, the observations

were made by their Lordships which were relevant and are being reproduced below:

> "It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement. The courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

The decision in **State of H.P.** Vs. **Shree Kant Shekari**, **(2004) 8 Supreme Court Cases 153**, shows that it was held by the Lordships that the testimony of rape victim can be acted upon without corroboration on material particulars. It was held that the victim of rape is not an accomplice. In that case, there was a delay of six months in lodging the FIR and since the prosecutrix was a girl of about 14 years who have been ravished by her teacher and she had not told the facts to her parents, the findings of the High Court that there was unexplained delay in lodging the FIR were not held to be sustainable.

It was also observed that in case court of facts finds it difficult to accept the version of the victim on its face value, it may search for evidence direct or circumstantial, which would lend assurance to her testimony.

Coming to the infirmity pointed out by the learned counsel for the appellant, the prosecutrix had clearly stated as PW-2 that the rapat was lodged by her and her signatures were also taken and the copy of the rapat has been proved in evidence as Mark-A and then was exhibited as PW8/A. It appears that the original rapat Rojnamcha register having her signatures was not shown to her and, only then, she could have stated that it bears her signatures but she stated in her statement that the rapat was also signed by her and the copy of the same is Mark A. The original rapat Rojnamcha was produced by PW-8 HHC Dinesh Kumar who had recorded the original rapat as stated by him and has proved the copy Ext.PW8/A. He has clearly stated that he had brought the original record with him in Court today. This copy of the original rapat Rojnamcha was proved in evidence though the prosecutrix due to the fault of the learned Public Prosecutor who conducted the case was not confronted with it or shown the original rapat bearing her signatures. However, this does not prove fatal for the prosecution story since the original was brought and its copy was proved according to law. Coming to the plea of false implication, it was never taken in the cross-examination of the prosecutrix or PW-3 Kundan Lal and there is nothing on record to show that as to why the prosecutrix or her uncle will falsely implicate the appellant and therefore, possibility of false implication is ruled out in the absence of any evidence or specific allegations made and substantiated by any evidence. The learned trial Court had observed

that the prosecutrix had corroborated the version as given in FIR on material particulars though the prosecutrix should have been confronted with the FIR in case there were any omissions or improvements etc. FIR cannot be taken as a substantive piece of evidence or it can be held that the prosecutrix had corroborated the version of occurrence as recorded in FIR on material particulars. FIR was lodged to set Investigating Agency in motion and all the facts or the details are not required to be mentioned and in case there is any omission, the prosecutrix has to be confronted with the previous report lodged by her. Coming to the plea regarding the recovery of chappal PW-3 Kundan Lal has stated that the chappal of one of the accused was left at the spot which he produced to the police, though he attributed that this belongs to Pawan Kumar who had left it at the place of occurrence. Investigating Officer PW-12 ASI Paras Ram had effected the recovery of the second chappal from the house of co-accused which is Ext.P-4 and that the recovered chappal was Ext.P-3 and both resembled to one another. In case chappal had been recovered from the house of co-accused and it was similar to the one as was left at the spot, this chappal cannot be linked to appellant since co-accused was tried by the Juvenile Court and, therefore, this evidence is not relevant insofar as the present appellant is concerned.

On discussion of the evidence led by the prosecution, it is clear that there are no material contradictions or infirmities in the statements of the prosecution witnesses. The presence of the appellant at the spot was clearly established from the statement of the prosecutrix as well as her uncle and there is nothing on record to show that the appellant was not known to the prosecutrix or that there was mistaken identity of the appellant. The medical evidence corroborates

the statement of the prosecutrix apart from the report of the chemical examiner and though no specific opinion was given by the Medical Officer that the prosecutrix was subjected to the sexual inter course but she has also not stated that the possibility of rape was ruled out. However, the fact that there were injury on the breast caused within duration of less than 24 hours and the report of the Chemical Examiner in regard to the slides and the clothes as discussed above corroborates the statement of the prosecutrix and as such, it can be held that the findings of learned trial Court holding the appellant guilty of the charge under Section 376 I.P.C. are based upon correct appreciation of evidence and law and those findings do not call for an interference by this Court and as such, I accordingly find that there is no merit in the appeal filed by the appellant. The sentence imposed by the learned trial Court can be said to be appropriate in view of the fact that the rape was committed upon a girl of above 16 years age and the sentence imposed calls for no interference. No submissions were made in that regard by the learned counsel for the appellant during the course of arguments also . The appeal filed by the appellant merits dismissal and is dismissed accordingly. Copy of the judgment be sent to the appellant through Jail Superintendent for information and filing of appeal, if any. A copy of the judgment along with record be sent to the concerned Court.

(V.K. Ahuja),
Judge

June 1, 2007
(BSS)